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No. 83-371

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRUCE E. FEIN
General Counsel
Federal Communications Commission
Washington, D.C. 20554

TABLE OF AUTHORITIES

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1. ITT attempts to portray this case as one whose decision hinges entirely on district court findings, urging affirmance on the ground that this Court "cannot undertake to review concurrent findings of fact of two courts below in the absence of a very obvious and exceptional showing of error." ITT Br. 19 (citing *Berenyi* v. *INS*, 385 U.S. 630, 635 (1967)). This portrait bears little if any resemblance to the actual physiognomy of the proceedings below.

As noted in our opening brief (Gov't Br. 8-10), the district court decided the Sunshine Act issue on cross

motions for summary judgment. In support of its motion, ITT submitted a "Statement of Material Facts" (J.A. 170-172), contending that "the following facts establish[ed] that [it was] entitled to judgment in its favor as a matter of law": (1) its exclusion from the Dublin Consultative Process session; (2) its exclusion from the Ascot Consultative Process session; and (3) the fact that certain "statements [had been] made by the FCC and its representatives at, or with respect to, their meetings."[1] The FCC replied (J.A. 173) that it had "[n]o objection" to these three factual allegations, acknowledging that the passages ITT quoted were "true copies" (J.A. 171) of statements the FCC or its representatives had made. In acknowledging that the quotations were accurate, of course, the Commission was not signalling its agreement with the various inferences of wrongdoing ITT sought to draw from the statements.

Apart from these (relatively few) undisputed facts, the facts before the district court—especially regarding "[t]he specific nature of [the] off-the-record discussions" in Dublin and Ascot—were, as the court of appeals put it, "sharply contested" (Pet. App. 6a). The FCC contended that the discussions involved an "informal exchange of views," and there was considerable evidence in the record to support that contention.[2] ITT contended that the discussions

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[1] These statements, nine in number, are discussed at page 9 note 4 of our opening brief, and are reprinted in full at J.A. 164-169.

[2] ITT repeatedly asserts (Br. 2-3, 7, 15, 17, 29, 32-33) that "there is not a shred of admissible evidence in the record" to support the FCC's characterization of the Dublin and Ascot discussions as an "informal exchange of views." This asser-

involved impermissible "negotiations," basing this argument on inferences from the statements referred to above (J.A. 164-169, 171-172). Despite these factual uncertainties, the FCC agreed for purposes of summary judgment that "there [were] no *material* facts in dispute" (J.A. 173 (emphasis added)), taking the position that the multinational sessions were not "meetings of the FCC" as a matter of law, regardless of what the attending Commissioners actually did there.

ITT would have this Court believe that the district court, in granting summary judgment, resolved all contested factual issues in ITT's favor, on the basis either of explicit findings or of FCC concessions. See, *e.g.*, ITT Br. 3, 7, 14, 17, 21, 27, 37. The record does not support this assertion. The district court made no findings of fact at all; it merely drew the legal conclusion that the components of a Sunshine Act "meeting" had been satisfied. See Pet. App. 65a-

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tion is untrue. As noted in our opening brief (Gov't Br. 4-8), the FCC in support of its characterization relied, not only on its own public pronouncements (Pet. App. 70a-87a; J.A. 92), but on the historical format of the Consultative Process (Pet. App. 79a-82a), transcripts of open FCC meetings (J.A. 159), summaries of closed Consultative Process sessions (J.A. 128-129), communications between FCC personnel and their European counterparts (J.A. 78, 80, 87), statements of individual Commissioners (J.A. 52) and statements of European participants (J.A. 128). All this evidence was in the record before the district court. In addition, the FCC relied on affidavits of one of the attending Commissioners (J.A. 175-176) and of the Assistant Bureau Chief (International) of its Common Carrier Bureau (J.A. 177-179), which were introduced into the record in connection with the FCC's applications for a stay.

66a.[3] And although the district court did not say what facts it relied on, the court must (in accordance with proper summary judgment procedure) have relied either on the (relatively few) uncontested facts described above, or on a view of the contested facts in the light most favorable to the FCC.

It is our contention that the district court, in granting summary judgment for ITT, and the court of appeals, in affirming that award, could have done so only in reliance upon an erroneous interpretation of the Sunshine Act. It is likewise our contention that, upon a correct interpretation of the statute, the district court was required—on the basis of the undisputed facts before it—to award summary judgment in favor of the Commission.[4] We will now ex-

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[3] ITT twice asserts (ITT Br. 16-17, 20) that the court of appeals "specifically affirmed the district court's determination" that the Consultative Process did not involve "informal discussions." The district court made no such determination; indeed, the word "informal" does not appear in its opinion (see Pet. App. 65a-66a). The court of appeals, in concluding (Pet. App. 43a) that the multinational sessions "[were] not 'chance meetings,' 'social gatherings,' or 'informal discussions' among members," was quoting, not the district court, but a statement by Representative Abzug on the House floor in 1976. See Pet. App. 43a n.172. Representative Abzug was not talking about the Consultative Process.

[4] As ITT properly observes (ITT Br. 20-21 & n.13), the FCC had the burden of proving that the Dublin and Ascot sessions were not subject to the Sunshine Act's open meeting rules. See 5 U.S.C. 552b(h)(1). A motion for summary judgment will be granted, however, if the papers before the district court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We contend that the Consultative Process sessions were not "meetings of the FCC" as a matter of law.

plain why ITT's brief does not shake our confidence in the correctness of these contentions.

2.a. The Consultative Process sessions could be deemed "meetings" for Sunshine Act purposes only if the attending Commissioners were "authorized to act on behalf of the agency" there (5 U.S.C. 552b(a)(1)). ITT makes two arguments in support of the court of appeals' conclusion that they were so authorized. Neither argument has merit.

First, ITT contends (ITT Br. 26) that the attending Commissioners, as members of the FCC's Telecommunications Committee,[5] had "a formal, official delegation of authority" to act on behalf of the full Commission at the Consultative Process. As we have noted earlier (Reply Mem. 7), ITT made this argument, for the first time, in its brief in opposition to our petition for a writ of certiorari (Br. in Opp. 20). Neither of the courts below discussed or relied on this argument. Indeed, the court of appeals acknowledged that the attending Commissioners had received no formal delegation of authority, hypothesizing that an unofficial delegation had been illegally conferred. See Pet. App. 36a, 53a; Gov't Br. 18.

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[5] The FCC abolished its two standing committees, including the Telecommunications Committee, effective February 24, 1984. 49 Fed. Reg. 6907 (1984). The Commission found that, "[w]ith the reduction in the number of commissioners from seven to five, and with the increase in applications as a consequence of new entry, the Telecommunications Committee procedures of the past are unnecessary." *Ibid.* The FCC's delegation orders were accordingly revised to delegate to the Chief, Common Carrier Bureau, authority previously delegated to the Telecommunications Committee. 49 Fed. Reg. 6908 (eliminating 47 C.F.R. 0.4 and 0.215, and amending 47 C.F.R. 0.291).

In any event, ITT's contention is as insubstantial as it is belated. The argument is premised on 47 C.F.R. 0.215, which, as noted previously (Gov't Br. 17-18), formerly delegated to the Telecommunications Committee authority to pass "upon all applications or requests * * * submitted under Section[] 214 of the Communications Act" where the estimated cost of construction exceeded $10 million. Section 214 requires common carriers to obtain a "certificate of public convenience and necessity" before starting construction of new communications facilities, whether interstate or international. 47 U.S.C. 214(a).

ITT does not appear to suggest that the attending Commissioners were literally engaged in "licens[ing] new international facilities" (ITT Br. 26) when they discussed trans-Atlantic communications matters in Dublin, Ascot, or Madrid.[6] Rather, it contends that the Committee's delegated authority was "sufficiently broad to apply to all of its actions" at the Consultative Process, on the theory that the Commissioners would gain information there that would be "directly related to" and might "assist [them] in discharging" their duties to act on *future* applications for construction permits, when and if submitted. *Id.* at 26, 27.

This argument proves too much. FCC Commissioners gain information that assists them in discharging their licensing authority, and that could be described

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[6] ITT does assert (ITT Br. 27) that "[t]he undisputed facts below established that the Telecommunications Committee was prepared to barter approval of proposed new communications facilities, which it ha[d] delegated authority to grant, for operating agreements for [Telenet] and Graphnet." As noted above (see pages 2-4, *supra*), the "undisputed facts" established no such thing, and the courts below made no such finding.

as "directly related" to their discharge of that authority, when they inspect facilities, read trade publications, converse with lawyers, consult with economists, or attend antitrust seminars But it could scarcely be contended that they thereby exercise their authority to approve certificate or license applications. On ITT's theory, a Commissioner would be deemed to be acting on applications for certificates of public convenience and necessity when he or she reads the *Washington Post* over breakfast.

Secondly, and alternatively, ITT follows the court below in contending that the FCC "violat[ed] the Communications Act" (ITT Br. 26) by making an unofficial and "unlawful" (*id.* at 18) delegation of authority to the attending Commissioners. ITT ignores our arguments that the notion of an "unofficial delegation of authority" is unprecedented (Gov't Br. 18), that an inference of illegal delegation is contrary to the "presumption of regularity" accorded agency action (*id.* at 18-19), that the Sunshine Act presupposes a formal delegation of power (*id.* at 19-20), and that an "unofficial delegation" theory would make it impossible to administer the Act's prospective rules (*id.* at 23-24). ITT seems to have abandoned the lower courts' primary rationale, *i.e.*, that "unofficial delegation" could be inferred from the supposed fact that the attending Commissioners were "authorized to submit recommendations" to the FCC upon their return. Pet. App. 37a-39a; see Gov't Br. 21-23. At bottom, ITT seeks to predicate an inference of sub rosa delegation on the facts that the Commissioners attended the Consultative Process "in their official roles" (ITT Br. 23), that they attended as FCC "representatives" with the Commission's "knowledge [and] approval" (*id.* at 24, 25, 28), and

that their attendance was important to realization of the FCC's regulatory objectives (*id.* at 24).

This argument again proves too much. The conditions ITT specifies will typically be met whenever agency members converse with people outside their office during the course of a working day. If satisfaction of those conditions sufficed to prove that agency personnel were "authorized to act on behalf of the agency," the Sunshine Act's open meeting rules would have virtually limitless application.

In sum, because the Sunshine Act presupposes an official delegation of authority—a delegation not conferred here—the attending Commisioners were not "authorized to act on behalf of the agency" at the Consultative Process, and those sessions were not "meetings" of the FCC, as a matter of law. The Commission was thus entitled to summary judgment on the Sunshine Act issue. This Court need go no further to decide the question.[7]

b. Even if the attending Commissioners could somehow be regarded as having been "authorized to act on behalf of the [FCC]" at the Consultative Process, those sessions would not be Sunshine Act

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[7] ITT twice asserts (ITT Br. 18, 29) that "[t]he FCC does not deny that if it was * * * 'in a negotiating stance' * * *, as it admitted below, the Sunshine Act would be fully applicable." To the contrary, we do deny this assertion, and deny it on two distinct levels. The FCC did not "admit[] below" that it was "in a negotiating stance" at the Consultative Process; the FCC consistently maintained the reverse, and ITT in support of its charge relied on an off-hand comment by Commissioner Washburn that was quoted out of context. See Gov't Br. 9 n.4. More importantly, it is our position that the Sunshine Act would not apply even if the attending Commissioners were "in a negotiating stance," since, as a matter of law, they had not been delegated authority to "negotiate" and since, as a matter of law, the sessions in any event were not "meetings of the FCC." See pages 10-11 *infra*.

"meetings" unless they entailed "deliberations" that "determine[d] or result[ed] in the joint conduct or disposition of official [FCC] business" (5 U.S.C. 552b(a)(2)). In our opening brief (Gov't Br. 24-33), we examined the evolution of the statute's language, as well as its legislative history. We showed that Congress used the word "deliberations" in its dictionary sense to mean "consideration and discussion of alternatives before reaching a decision" (*id.* at 24), and that Congress used the phrase "determine or result in the joint conduct or disposition of official agency business" to reach only those discussions that "effectively predetermine official action" on concrete proposals pending or likely to arise before the agency (*id.* at 29). We concluded that ITT had introduced no evidence sufficient to create a triable issue as to whether the Consultative Process sessions were "meetings" under this standard.

ITT in its brief does not come to grips with the statute's language or legislative history. Rather, it simply asserts that the Sunshine Act's open meeting rules were "intended to encompass any information-gathering process that is likely to have a meaningful impact on final agency action" (ITT Br. 30; see *id.* at 32-33). But the purpose of the Sunshine Act, as expressed in its preamble, was to open agencies' "decisionmaking processes," not their information-gathering processes, to public view. See Gov't Br. 15, 32. Government officials gather information in countless ways. On ITT's theory, the Act would apply to dinner conversations, working lunches, and discussions around the water cooler, so long as some federal judge could be persuaded that the conversation was "likely" to have a "meaningful impact" on some agency action. As we have demonstrated earlier (Gov't Br. 28-29, 32-33), Congress did not intend the Act's open meeting rules to have such boundless scope.

c. Even if the Consultative Process sessions were "meetings," they would not trigger the Sunshine Act's coverage unless they were "meetings of [the FCC]" (5 U.S.C. 552b(b)). In our opening brief (Gov't Br. 34-36), we analyzed the statute's language and structure to show that a meeting is an "agency meeting" (5 U.S.C. 552b(c)) only if it is run by, and within the unilateral control of, the agency in question. We explained that the attending Commissioners were in no position to control the multinational conferences involved here.

While appearing to accept our interpretation of the statute, ITT contends (ITT Br. 34) that "[t]he extent of the FCC's 'control' over the closed meetings is an issue of fact." Noting that the foreign administrations sometimes accommodated the attending Commissioners' views on other matters, ITT asserts that "[t]here is no reason to assume that the FCC could not convince [them]" to let the gatherings be covered by the Government in the Sunshine Act (*id.* at 34, 35).[8]

ITT seeks to have this question—like every other question concerning the Sunshine Act's application—be resolved by trench warfare over the facts. But this mode of decisionmaking is calculated to facilitate harassment of regulatory agencies and to make administration of the Act's prospective rules impossible

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[8] In making this point, ITT says that the Commissioners might have persuaded the foreign administrations "to continue the traditional 'open meeting' format of the Consultative Process" (ITT Br. 35; see *id.* at 7). This statement, to the extent it suggests that Consultative Process sessions were traditionally open to the public, is misleading. As we have noted earlier (Gov't Br. 5), the Consultative Process had never been open to the public, but only to invited carriers, and European participants objected to general public participation (J.A. 177-178).

(see Gov't Br. 23-24). In our view, the question whether agency members "control" a meeting should be answered, not by minute inquiry into the dominant or submissive characteristics of the participants' psychological make-up, but by a commonsense and objective evaluation of the terms on which the meeting is held.

Here, the discussions were held on foreign soil, hosted by foreign governments, and attended by foreign officials who outnumbered the attending Commissioners and equalled them in rank. The whole point of the Consultative Process was to enable "foreign entities [to] participate without being subjected 'to U.S. regulatory jurisdiction in fact or appearance.'" Pet. App. 79a, quoting *In re AT&T Co.*, 73 F.C.C.2d 248, 254 (1979). Because the attending Commissioners did not have unilateral control over the Consultative Process, they could not dictate that the sessions be governed by U.S. law, and this inherent lack of power cannot be gainsaid by speculating about how "convinc[ing]" their oratory might have been. In short, because the terms under which the sessions were held established per se that they were not "meetings of the FCC," the Commission was entitled to summary judgment as a matter of law.[9]

3. Our position on the jurisdictional issue is fully set forth in our opening brief (Gov't Br. 38-48).

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[9] ITT contends that, if the foreign administrators would not agree to have their meetings governed by U.S. law, the FCC would have had "no choice but to refrain" from letting its Commissioners attend (ITT Br. 35). As noted in our opening brief (Gov't Br. 35), however, such a result would convert the Sunshine Act's procedural rules into a substantive restriction on FCC action, contrary to Congress's explicit intent not to "change[] the substantive laws governing * * * any agency." S. Rep. 94-354, 94th Cong., 1st Sess. 1 (1975). ITT makes no response to this argument.

ITT's arguments on this score merit several comments:

a. We have argued that the jurisdictional issue is controlled by this Court's decision in *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965). See Gov't Br. 39, 40, 43 & n.22, 44-45 n.24, 47-48. ITT does not mention this case in its brief.

b. ITT's main argument for district court jurisdiction of its ultra vires claim (ITT Br. 38, 43) is that the Consultative Process would not yield any "final agency order" reviewable by the court of appeals under 47 U.S.C. 402(a). We of course agree (Gov't Br. 48 n.28) that the Consultative Process would not itself yield any "final order" subject to judicial review. Our position is that ITT had already presented (or could have presented) its ultra vires claim to the FCC in a proceeding that *would* yield a final order subject to judicial review, and that statutory review in the court of appeals under Section 402(a) was thus exclusive.

c. ITT appears to accept our contention (Gov't Br. 41-42 & n.20) that its rulemaking petition *presented* the ultra vires claim to the Commission. See ITT Br. 11. ITT nevertheless asserts (*id.* at 39, 41 & n.28) that it could not have obtained complete relief with respect to that claim in the context of a notice-and-comment rulemaking proceeding. We doubt that this is true (see Gov't Br. 41-43), and, if true, whether it would affect the jurisdictional outcome. But in any event, as we pointed out in our opening brief (*id.* at 43-44), ITT could have eliminated any uncertainty on this score by filing with the FCC a motion for a declaratory ruling (see 47 C.F.R. 1.2) concerning the legality of the attending Commissioners' conduct. Judicial review of such a declaratory ruling would likewise have lain in the court of ap-

peals (see Gov't Br. 44 & n.23), and the court of appeals, if it agreed with ITT's contention that ultra vires conduct had occurred, would have had power to afford ITT complete relief. See ITT Br. 41 n.28. ITT does not address the availability of a declaratory ruling.

d. ITT appears to argue (ITT Br. 19, 37, 43-44, 45 & n.33) that the district court's jurisdiction could be sustained under the "patent violation" doctrine of *Leedom* v. *Kyne*, 358 U.S. 184 (1958). This Court there upheld district court jurisdiction to set aside agency action "in excess of [the agency's] delegated powers and contrary to a specific provision" in the agency's organic statute. 358 U.S. at 188.

ITT did not rely on the "patent violation" doctrine in either court below. The district court noted the doctrine's existence, but "seriously doubt[ed] that ITT could meet this standard" (Pet. App. 62a). The court of appeals adverted to the doctrine, but held it "inapposite to the instant controversy" (Pet. App. 16a-17a n.59). The lower courts' reservations were well founded, since the Commissioners' attendance at the Consultative Process plainly did not violate any clear statutory prohibition or constitute a patent violation of the FCC's authority. Even if it were proper to consider ITT's "patent violation" charge at this stage, therefore, the doctrine would not support district court jurisdiction on the facts presented here.

e. While appearing to agree with our contention (Gov't Br. 44-45 n.24, 47) that the "primary jurisdiction" doctrine would otherwise be relevant, ITT asserts (ITT Br. 44-45 n.32) that the doctrine is inapplicable on the facts presented here because the FCC is a party. In ITT's view, the primary jurisdiction doctrine "has no applicability when the agency itself is the *defendant* in the lawsuit" (*id.* at 45 n.32

(emphasis in original)). ITT cites no authority for this proposition, and we know of none. We note that the FCC was a defendant in *Writers Guild of America, Inc.* v. *American Broadcasting Companies, Inc.*, 609 F.2d 355 (1979), cert. denied, 449 U.S. 824 (1980), in which the Ninth Circuit held the FCC to have primary jurisdiction of the questions there presented, notwithstanding allegations that the Commission "[could] not adjudicate a charge of 'serious misconduct' involving itself and its Chairman." 609 F.2d at 363-364.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

BRUCE E. FEIN
General Counsel
Federal Communications Commission

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